Nos. 98-791, 98-796

IN THE
Supreme Court of the United States

J. DANIEL KIMEL, JR., *et al.*,
Petitioners,
v.
STATE OF FLORIDA BOARD OF REGENTS, *et al.*,
Respondents.

UNITED STATES OF AMERICA,
Petitioner,
v.
FLORIDA BOARD OF REGENTS, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR PETITIONERS J. DANIEL KIMEL, JR., *ET AL.*

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I. THE ADEA UNEQUIVOCALLY EXPRESSES CONGRESS' INTENT TO ABROGATE THE STATES' ELEVENTH AMENDMENT IMMUNITY

FLSA § 16(b) provides that suits "may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees," and FLSA § 3(x) defines "public agency" to include "a State, or a political subdivision of a State." Congress drafted this language to provide the clear statement of its intent to abrogate the State's Eleventh Amendment immunity required by *Employees v. Missouri Public Health Dept.*, 411 U.S. 279 (1973). *See* Brief for Petitioners ("Pet. Br.") 18-19.

ADEA § 7(b) in its turn incorporates into that Act the FLSA § 16(b) right-of-action provision by reference. In this way the ADEA unequivocally expresses Congress' intent to abrogate State immunity from suits by employees in federal court.

1. Respondents' primary argument to the contrary is a series of semantic quibbles.

(a) Respondents would first sweep away the ADEA's incorporation of § 16(b) on the theory that § 16(b) refers to suits "to recover the liability prescribed in . . . the [first two] sentences [of § 16(b)]," and those sentences refer only to FLSA suits. Brief for Respondents ("Resp. Br.") 18.

Hoffmann-LaRoche, Inc. v. Sperling, 493 U.S. 165 (1989), forecloses that theory. Recognizing § 16(b)'s right-of-action provision as "one of the provisions the ADEA incorporates," *id.* at 167, the Court held that "[t]he ADEA, through incorporation of [16(b)], expressly authorizes employees to bring collective age discrimination actions 'in behalf of . . . themselves and other employees similarly situated.'" *Id.* at 170 (quoting § 16(b)). The language in § 16(b) which provides that employees may sue public agencies in federal court is part of the same sentence as the language applied in *Hoffmann-LaRoche* that allows such suits to be brought collectively. Thus,

just as "the ADEA, through incorporation of § [16(b))], expressly authorizes" employees to sue collectively, it likewise expressly authorizes them to sue the States in federal court.

In addition to ignoring *Hoffmann-LaRoche*, respondents ignore the language of ADEA § 7(b). The second sentence of § 7(b) states that violations of the ADEA "shall be deemed to be" violations of the FLSA, and the third sentence states that "[a]mounts owing to a person as a result of a violation of [the ADEA] shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections [16 and 17] of [the FLSA]." In turn, § 16(b)'s first sentence identifies "unpaid minimum wages" and "unpaid overtime compensation" as the "liab[ility]" an employer incurs for violating the wage and hour requirements of the FLSA. By operation of these interrelated provisions, an action to recover "[a]mounts owing to a person as a result of a violation of [the ADEA]" *is* a form of action "to recover the liability prescribed in" the opening sentences of § 16(b), and hence is covered by the FLSA right-of-action provision.[1]

(b) While ADEA § 7(b) thus accomplishes an incorporation by reference of the right-of-action provision of FLSA § 16(b), and does so in terms, respondents claim that there is a negative inference from ADEA § 7(c)(1) that overrides that express incorporation. Resp. Br. 17. Section 7(c)(1), as enacted in 1967 and as it continues to read, states that an aggrieved person "may bring a civil

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[1] Indeed, the sole office of the "deeming" provisions in § 7(b) is to ensure that the references in § 16(b) to provisions of the FLSA will not operate, as respondents propose, to undo the incorporation of § 16(b) into the ADEA. In providing that violations of the ADEA "shall be deemed to be" FLSA wage and hour violations, Congress obviously was not suggesting that violations of the ADEA actually result in a failure to pay minimum wages or overtime compensation, or that ADEA monetary awards should be calculated as if that were the case.

action in any court of competent jurisdiction." According to respondents, it is "inscrutable" that the 1974 Congress would both incorporate the FLSA right-of-action provision into the ADEA and leave ADEA § 7(c)(1) on the books. But the mystery respondents conjure up is not mysterious at all. There is no contradiction between § 7(b), with its incorporation by reference of FLSA § 16(b), on the one hand, and § 7(c)(1) on the other—the former is simply more detailed and the latter more general. Where, as in this instance, there is no contradiction, it is by no means uncommon for a legislative draftsperson to preserve a preexisting provision for safety's sake, even if it may no longer be strictly necessary in light of an amendment that deals with a subject in more detail.

(c) In a variation on the theme that § 7(c)(1)'s general right-of-action provision should be treated as overriding the more specific FLSA provision incorporated by § 7(b), respondents propose that § 7(b) should be construed as "incorporat[ing] some FLSA provisions but not those expressly covered in the ADEA itself." Resp. Br. 18. That construct cannot be squared with § 7(b)'s language, which expressly incorporates the "powers, remedies, and procedures provided in section . . . [16] *(except for* subsection (a) thereof)," and "*provided that* liquidated damages [which § 16(b) makes routinely available for FLSA violations,] shall be payable only in cases of willful violations of [the ADEA]." The structure of § 7(b) thus establishes that, "but for those changes Congress expressly made, it intended to incorporate fully the remedies and procedures of the FLSA." *Lorillard v. Pons*, 434 U.S. 575, 578-80 (1978). And, one change Congress did *not* make was to exclude from incorporation those parts of § 16(b) that address matters "covered in the ADEA itself." Resp. Br. 18.[2]

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[2] Indeed, if respondents' construction were correct, the *Hoffmann-LaRoche* Court should not have treated the collective-action provi-

2. Quoting *Dellmuth v. Muth*, 491 U.S. 223, 231-32 (1989), and *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 246 (1985), respondents declare that FLSA § 16(b) does not serve to abrogate State immunity in any event because "[a] general authorization for suit is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment." Resp. Br. 18-19.

There is nothing "general" about what § 16(b) authorizes: that provision specifically authorizes employees to sue "public agencies," including States, in state or federal court. *See supra* at 1. As the Court recognized in *Alden v. Maine*, 119 S.Ct. 2240, 2246 (1999), § 16(b) thus "purport[s] to authorize private actions against States . . . without regard for consent." Section 16(b) therefore stands in sharp contrast to the right-of-action provision in *Dellmuth*, which stated only that an aggrieved party could "bring a civil action" in state or federal court, without specifying the classes of potential defendants against whom such an action could be brought, *see* 491 U.S. at 228; and no other provision of the statute "sp[oke] to what parties are subject to suit," *id.* at 231. The statute in *Atascadero* likewise did not specifically refer to suits against a State. *See* 473 U.S. at 245-46.

Given the clarity of the language in § 16(b) and the fact that it was adopted by Congress for the precise purpose of satisfying the "clear statement" rule of *Missouri Employees*, respondents' ultimate position is that that rule cannot be satisfied no matter how unequivocally Congress has authorized the maintenance of claims by private parties against States in federal court, unless Congress has *in addition* stated in so many words that the effect of its action is to "revoke the State's right to assert one of the defenses—sovereign immunity—to those claims." Resp.

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sion of § 16(b) as having been incorporated into the ADEA, because the right to maintain an action is "covered in" ADEA § 7(c).

Br. 19. There is no support for that position in this Court's decisions. As Justice Scalia, concurring in *Dellmuth*, pointed out, the Court's decision in that case "does not preclude congressional elimination of sovereign immunity in statutory text that clearly subjects States to suit for monetary damages, though without explicit reference to state sovereign immunity or the Eleventh Amendment." 491 U.S. at 233. And, there was no reference to sovereign immunity or the Eleventh Amendment in the statute at issue in *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996), yet the Court there held that Congress had adequately expressed its intent to provide a private cause of action abrogating the States' immunity. *See id.* at 56-57.

II. THE APPLICATION OF THE ADEA TO THE STATES IS WITHIN CONGRESS' POWER UNDER SECTION FIVE OF THE FOURTEENTH AMENDMENT

Congress' Fourteenth Amendment § 5 power to enact antidiscrimination legislation applicable to the States, such as the ADEA, is conditioned, respondents maintain, in three ways pertinent here: (i) Congress must explicitly ground the legislation in the Amendment, Resp. Br. 27-30, (ii) Congress must make specific findings of pervasive constitutional violations on the part of the States, *id.* at 30-39, and (iii) Congress' enactment must be sufficiently proportionate "to a supposed remedial or preventive object" as to "be understood as responsive to, or designed to prevent, unconstitutional behavior," *id.* at 39 (quoting *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997)).

Respondents are wrong as a matter of law in the first two regards—this Court's cases make it clear that Congress' legislative authority does not depend on making the kinds of recitals and findings respondents would require. And while respondents correctly quote the proportionality

standard of *City of Boerne*, their conclusion that the ADEA does not meet that standard is wrong, because the conclusion is grounded on the erroneous premise that "it is difficult to imagine an act of age discrimination in employment that would rise to the level of a constitutional violation." Resp. Br. 26.

A. Congress' Authority Is Not Dependent on an Express Invocation of Particular Constitutional Powers

1. *EEOC v. Wyoming*, 460 U.S. 226, 243 n.18 (1983) rejects in terms respondents' "express invocation" limitation on Congress' § 5 legislative power:

> It is in the nature of our review of congressional legislation defended on the basis of Congress' power under § 5 of the Fourteenth Amendment that we be able to discern some legislative purpose or factual predicate that supports the exercise of that power. That does not mean, however, that Congress need anywhere recite the words "Section 5" or "Fourteenth Amendment" or "equal protection," *see, e.g., Fullilove v. Klutznick*, 448 U.S. 448, 476-478 (1980) (Burger, C.J.), for "[t]he . . . constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948).

It is a principle of long standing in this Court that, when Congress' power to enact legislation is challenged, "[t]he question is . . . whether there is any authority conferred upon Congress by which this particular . . . statute can be sustained." *Keller v. United States*, 213 U.S. 138, 147 (1909). For that principle to apply, Congress need not "state the legal theory upon which [a statute] was enacted." *Id.* at 149 (Holmes, J., dissenting). Rather, the Court will consider all powers, stated or not, that "have any bearing upon the validity of the statute under review." *United States v. Butler*, 297 U.S. 1, 63 (1936).

As the Court explained in *United States v. Harris*, 106 U.S. 629 (1883), this rule is part and parcel of the presumption of constitutionality to which all legislation is entitled. "This presumption should prevail unless the lack of constitutional authority to pass an Act in question is clearly demonstrated." *Id.* at 635. Although "every valid Act of Congress must find in the Constitution some warrant for its passage," *id.* at 636, it falls to those challenging a statute to demonstrate that no such warrant exists. To determine whether such a demonstration has been made, a court must consider "[every] paragraph[] in the Constitution which can, in the remotest degree, have any reference to the question in hand." *Id.*

2. Against all this, respondents invoke two cases—*Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981), and *Florida Prepaid Postsecondary Ed. Expense Board v. College Savings Bank*, 119 S.Ct. 2199, 2208 n.7 (1999). *See* Resp. Br. 28-29. As we have explained, *Pennhurst* states a rule for construing the substantive terms of an ambiguous statute, not a rule delimiting Congress' legislative power. *See* Pet. Br. 29 n.18. And the portion of *Florida Prepaid* to which respondents point stands for the proposition, not relevant here, that it is not proper for the courts in passing on the constitutionality of a statute to override Congress as to the relevant predicate authority for a legislative action where "Congress was so explicit about invoking its authority under [a particular constitutional provision]" and there is "no suggestion in the language of the statute itself, or in the [committee reports]" that Congress was relying on other constitutional provisions. 119 S.Ct. at 2208 n.7.

That rule of judicial deference has by its nature no application to the common situation in which Congress is not so explicit in invoking one predicate source of constitutional power as to require the conclusion that Congress must have regarded all other possible predicates as

inapplicable. Throughout this Court's jurisprudence, that common situation has been governed by the rule stated in *EEOC v. Wyoming*. The *Florida Prepaid* footnote cannot, as respondents would have it, be leveraged into an affirmative judicial requirement that Congress must state the constitutional predicate of its legislation at the pain of having the courts declare the enactment unconstitutional.

The situation governed by the *EEOC v. Wyoming* rule is the situation presented in this case. Respondents note that the relevant committee reports accompanying the 1974 legislation contain some references to interstate commerce—and a single reference to the commerce power itself—unaccompanied by any reference to the Fourteenth Amendment. *See* Resp. Br. 5, 33-34. But the ADEA provisions of that legislation comprised only one section of a 29-section Act, whose 28 other sections dealt with wage and hour issues rather than with any kind of discrimination issue. The references in the committee reports to interstate commerce pertain to those other sections.[3] In respect to the one section that extended the ADEA to the States, there is nothing in the Act or the legislative history which makes it "explicit [that Congress was] invoking its authority under [the Commerce Clause]," *Florida Prepaid*, 119 S. Ct. at 2208 n.7, much less that

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[3] For example, the reference that appears in H.R. Rep. No. 93-913, at 2 (1974) is found in a section entitled "Purpose of the Legislation," which contains a detailed summary of the wage and hour provisions of the legislation but does not even make mention of the ADEA section of the Act.

It bears noting in this regard that the FLSA wage and hour provisions, by their terms, apply only to activities "in commerce." 29 U.S.C. §§ 206, 207. In contrast, although Congress provided that *private* employers must be "engaged in an industry affecting commerce" in order to be covered by the ADEA, *see* 29 U.S.C. § 630(b) (first sentence), the 1974 amendments extended the ADEA to "any agency or instrumentality of a State," without any requirement that the public body be engaged in commerce. *Id.* (second sentence).

Congress was doing so to the exclusion of other constitutional powers.[4]

B. The ADEA's Status as Permissible Enforcement Legislation Under § 5 Does Not Depend on Whether Congress Made Explicit Findings of a Pervasive Pattern of Fourteenth Amendment Violations by the States

Respondents' attack on the adequacy of Congress' findings regarding State age discrimination in employment is doubly defective.

1. (a) First, "Congress need [not] make particularized findings in order to legislate. . ., even in areas . . . where States historically have been sovereign." *United States v. Lopez*, 514 U.S. 549, 563, 564 (1995) (*quoting Perez v. United States*, 402 U.S. 146, 156 (1971)). "Congress, of course, may legislate without compiling the kind of 'record' appropriate with respect to judicial or administrative proceedings." *Fullilove v. Klutznick*, 448 U.S. 448, 478 (1980) (opinion of Burger, C.J.). *See also Astoria Federal S. & L. Ass'n. v. Solimino*, 501 U.S. 104, 113-14 (1991) (ADEA provision denying preclusive effect to state agency rulings is reasonable because "[i]t . . . may well be that Congress thought state agency consideration generally inadequate to ensure full protection against age discrimination in employment," even though Congress made no formal finding to that effect).

To be sure, where the connection between a statute and an asserted source of congressional power is so attenuated as not to be "visible to the naked eye," *Lopez*, 514 U.S. at 563, congressional findings may assist in making the

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[4] If it were appropriate to attempt "to enter the minds of the Members of Congress," *see Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 30 (1989) (Scalia, J., concurring in part and dissenting in part) with respect to this matter, there is evidence that the primary sponsor of the ADEA's extension to the States—Senator Bentsen—may well have been relying on § 5. *See* Brief of the United States ("U.S. Br.") 18 n.18.

connection apparent. *Id.* But where, as is the case here, the provisions of a statute are on their face directed at a kind of discrimination that would violate the Fourteenth Amendment, *see* Pet. Br. 27-44, a requirement by the judiciary that Congress present explicit findings about the need for the legislation would be no more appropriate under our separation of powers than "an Act of Congress mandating long opinions from this Court," *Lopez*, 514 U.S. at 614 (Souter, J., dissenting).

(b) This Court's decisions under § 5 do not support respondents' argument that Congress' power to enforce the Fourteenth Amendment is conditioned on a special "findings" requirement. In *Katzenbach v. Morgan*, 384 U.S. 641 (1966), the Court sustained a federal provision invalidating state laws requiring literacy in English as a condition of voting, on the ground, *inter alia*, that, by giving New York's Puerto Rican community "enhanced political power," the provision "may be viewed as a measure to secure for the Puerto Rican community residing in New York nondiscriminatory treatment by government . . . in the . . . administration of governmental services." *Id.* at 652. The Court reaffirmed the validity of *Morgan*'s analysis on this point in *City of Boerne*, 521 U.S. at 528. Yet, in *Morgan* there was "no legislative record supporting such hypothesized discrimination." 384 U.S. at 669 and n.9 (Harlan, J., dissenting). In fact, there were "no committee hearings or reports [at all] referring to [the challenged provision]." *Id.*

So too, in *Maher v. Gagne*, 448 U.S. 122 (1980), where the Court upheld Congress' power to require States to pay attorney's fees to a plaintiff who prevails on "a wholly statutory, non-civil-rights claim" that is pendent to an unadjudicated constitutional claim, *id.* at 132, the Court did not refer to any findings of a pattern of unconstitutional State conduct in determining that Congress' authorization of such fee awards is "an appropriate means

of enforcing substantive rights under the Fourteenth Amendment." *Id.* at 133.[5]

(c) Respondents' proffered authority for their "special findings" requirement, once again, is inapposite. In *City of Boerne*, confronted with a statute that, on its face, was designed to create new rights rather than to enforce any right protected by the Fourteenth Amendment, *see* Pet. Br. 25-26, the Court looked to legislative history to see whether that history would confirm the Court's assessment of the statute, or whether it might reveal a constitutionally proper basis for the statute that was not apparent from the statute's text. *See* 521 U.S. at 530-31. In undertaking that examination, the Court took care to explain that it was *not* adopting a requirement of legislative findings, *id.* at 531-32:

> Judicial deference, in most cases, is based not on the state of the legislative record Congress compiles but "on due regard for the decision of the body constitutionally appointed to decide." *Oregon v. Mitchell*, 400 U.S. [112 (1970)], at 207 (opinion of Harlan, J.). As a general matter, it is for Congress to determine the method by which it will reach a decision.

And in *Florida Prepaid* as well, the provisions of the Patent Remedy Act bore no apparent connection to matters that would fall within the purview of the constitutional provision (the Due Process Clause) offered as the source of Congress' legislative power. *See* Pet. Br. 26. Thus, in *Florida Prepaid* as in *City of Boerne*, no constitutional

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[5] Nor did Congress make findings of a pattern of constitutional violations when it applied to the States the provisions of Title VII that require reasonable accommodation of employees' religious practices. *See Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 67 (1986) (noting that the reasonable accommodation provision was adopted "with little discussion"). And, as far as we are aware, Congress made no findings of a pervasive pattern of constitutional violations on the part of the States when it applied to the States the provisions of Title VII that prohibit sex discrimination.

predicate for the legislation was "visible to the naked eye." *Lopez*, 514 U.S. at 563. Unsurprisingly, the Court turned to the statute's legislative history in search of a possible constitutional predicate. 119 S.Ct. at 2207-10. *Florida Prepaid* cannot fairly be read as establishing a rule that explicit findings of a pattern of unconstitutional behavior are essential where, as in this case but not in *Florida Prepaid*, the statute in question can be seen on its face to be directed at preventing and remedying conduct that has "a significant likelihood of being unconstitutional." *Id.* at 2210.

(d) Respondents' suggestion that the Court should impose a special "findings" requirement on § 5 so as to preclude a "parliamentarian supremacy" that could "bend State sovereign functions to congressional will," Resp. Br. 22, is made of whole cloth. The Commerce Clause, no less than § 5, enables Congress to legislate in areas touching on state sovereignty—indeed, as the Court held in *EEOC v. Wyoming*, the Commerce Clause gives Congress the power to impose the substantive requirements of the ADEA on the States—but the Court has not imposed a "findings" requirement on Commerce Clause legislation. *Lopez, supra.*[6] There is no better warrant for imposing such a requirement on § 5 legislation.

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[6] Despite their professed concern about the ADEA's impact on "sovereign functions," respondents acknowledge that the substantive provisions of the Act are properly applicable to the States. *See* Resp. Br. 14. The argument of the State amici that the ADEA "intrude[s] deeply into the operation of State government" therefore is beside the point. *See* Brief of *Amici Curiae* States of Ohio and Tennessee, *et al.* ("State Br.") 26. Like respondents, the State amici recognize that they cannot challenge "the ADEA itself." *Id.* at 2, 29. That is because this Court rejected in *Wyoming* the very kind of "intrusion" argument the amici advance. *See* 460 U.S. at 239-42. And, the amici's protestation that the ADEA hampers government operations is contradicted by their assertions that the "substantive protections" made applicable by the ADEA "are available in similar or better measure by the States' own laws," State Br. 29, and that state civil service laws, "designed to drain em-

2. We believe the foregoing is dispositive of respondents' demand for ever greater and better congressional findings. But there is more: respondents' claim that the congressional findings here are inadequate is so attenuated as to be ephemeral.

Even though the author of the provisions extending the ADEA to the States, Senator Bentsen, specifically stated that the evidence available to Congress "revealed that State and local governments have also been guilty of discrimination toward older employees," 118 Cong. Rec. 7745 (1972), and the committee reports are to the same effect, *see* U.S. Br. 37 n.40, it is argued (i) that Congress did not cite a sufficient number of examples of age discrimination by public employers, (ii) that some of the examples the legislators cited involved employees of the federal government or of local agencies rather than of state agencies, (iii) that Congress did not "clarify whether the identified conduct violates *equal protection*," and (iv) that in any event the existence of state laws prohibiting age discrimination in public employment precludes the possibility that the States might engage in such discrimination. *See* Resp. Br. 31-32, 35-38; State Br. 5, 15-19; Brief of Amicus Curiae Pennsylvania House of Representatives, Republican Caucus 7-13.

These arguments strain matters far past the breaking point. Read against the backdrop of the extensive fact-finding in which Congress engaged in the years leading up to the enactment of the 1967 statute, and the lessons Congress learned regarding the nature and underlying causes of age discrimination in employment, the 1974 amendments reflect an informed and considered legislative judgment that arbitrary and irrational age discrimination

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ployment decisions of everything but merit," operate to "automatically remov[e] age as well as other improper classifications from the equation," *id.* at 21.

is a problem in the workplaces of state agencies just as it is in other workplaces.[7]

In its 1967 deliberations with respect to the ADEA, Congress found that arbitrary and unfounded stereotypes about the abilities of older workers are endemic in our society, and that these stereotypes lead to discrimination against those workers. *See* materials cited in Pet. Br. 28-32 and U.S. Br. 29-39. Although the legislation then before Congress was confined to the private sector, nothing in Congress' findings, or in the wealth of evidence on which they were based, suggested that the problem of age discrimination in employment was one deriving from the profit motive or from any other factor unique to private-sector employment. And when Congress turned its attention to the question whether the statute should be extended to the public sector, the Legislature determined that the "preconceived notions or myths" that result in discrimination against older workers in the private sector were at play in the public sector and with the same result. H.R. Rep. No. 93-913 (1974) at 40-41; S. Rep. No. 93-690 (1974) at 55-56. *See* Pet. Br. 31-32; U.S. Br. 36-38.

The States themselves apparently have made the same judgment. Respondents stress that "[v]irtually all" States have enacted statutes applicable to the State as employer which "permit monetary relief against the sovereign . . . [for] the same practices as the ADEA." Resp. Br. 2-3. This shows that the States are aware that those who conduct the business of the States as employers engage in "th[os]e same practices" to such an extent as to warrant remedial legislation.

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[7] As Justice Powell noted in *Fullilove v. Klutznick*, 448 U.S. 448 503 (1980) (Powell, J., concurring), "[o]ne appropriate source [of evidence for Congress] is the information and expertise that Congress requires in the consideration and enactment of earlier legislation."

Respondents' contention that the existence of these state statutes makes it all but impossible to "posit an instance of State conduct that violates equal protection," *id.* at 37, completely misses the mark. That state laws may prohibit the same conduct as the ADEA does not mean that state personnel officials will uniformly comply with those state laws, any more than they will universally comply with the ADEA itself.

And, unlike the case with the Due Process Clause, *see Florida Prepaid*, 119 S.Ct. at 2208, the existence of state remedies is irrelevant to the question whether the discriminatory acts of state officials are a proper subject of Equal Protection Clause enforcement legislation. "[L]egislation designed to deal with . . . discrimination [by state officials] is 'appropriate legislation' under [the Civil War Amendments, and it] makes no difference that the discrimination in question, if state action, is also violative of state law." *United States v. Raines*, 362 U.S. 17, 25 (1960). "[E]very state official, high and low, is bound by the Fourteenth and Fifteenth Amendments . . . [I]t follows from this that Congress has the power to provide for the correction of the constitutional violations of every such official without regard to the presence of other authority in the State that might possibly revise their actions." *Id.* *See generally Patsy v. Florida Board of Regents*, 457 U.S. 496 (1982).

C. The ADEA Is a Congruent and Proportional Means of Preventing and Remedying Unconstitutional Conduct

After much discussion of what Congress supposedly failed to recite or to find, respondents' brief finally turns to the ADEA's substance, arguing "above all else" that "it simply cannot be said that 'many of [the State employment actions] affected by the congressional enactment have a significant likelihood of being unconstitutional.'" Resp. Br. 40 (quoting *Florida Prepaid*, 119 S.Ct. at

2210) (in turn quoting *City of Boerne*, 521 U.S. at 532).[8]

Respondents' argument fails because it is based on a fundamental misconception of equal protection. The ADEA is crafted in measured terms to prevent and remedy arbitrary age discrimination in employment. *See* Pet. Br. 33-36, 42-44; U.S. Br. 40-49.[9] As a matter of the most basic

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[8] Respondents make a passing assertion that the ADEA cannot qualify as "calibrated remedial legislation" because it "applies in equal measure to State and private employers," despite the "different economic and social pressures" and different "employment risks" in the two settings. Resp. Br. 39. That the "pressures" and "risks" of age discrimination may differ from one setting to another does not mean that the basic remedial scheme of the statute should vary. And, where relevant, Congress *did* tailor the application of the statute to public employment. *See* Pet. Br. 35 and n.21.

Nor do this Court's decisions suggest that an antidiscrimination statute like the ADEA must contain a sunset provision in order to be considered remedial. Age discrimination in government workplaces, no less than in other workplaces, is not some passing phase, and "§ 5 legislation [does not] require[] termination dates, geographic restrictions, or egregious predicates." *City of Boerne*, 521 U.S. at 533.

[9] Contrary to respondents' suggestion (Rep. Br. 43-44), in the ADEA Congress did not apply to claims of age discrimination the same statutory scheme as Title VII applies to claims of racial discrimination. To be sure, as "part of [the] ongoing congressional effort to eradicate discrimination in the workplace," *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 357 (1995), the ADEA contains some of the core provisions of the paradigm statute. But there are significant differences, including, among others, the ADEA's "reasonable factors other than age" defense, the special provisions applicable to benefit programs, and the defense for "bona fide occupational qualifications" (which, under Title VII, is available in cases involving religion, sex, or national origin, but not in cases involving race, *see* 42 U.S.C. § 2000e-2(e)). *See* Pet. Br. 34-35. Although respondents and their amici go to some lengths to minimize the importance of the BFOQ defense, that defense permits an employer (among other things) to rely on age as a proxy for relevant job qualifications where "some members of the . . . class [of older workers] possess a trait precluding safe and efficient job performance" and "it is 'impossible or highly impractical' to deal with the older employees on an individualized basis." *Western Air Lines*,

principle, that kind of governmental discrimination against individuals who are members of a certain class based on "inaccurate and stigmatizing stereotypes," *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993), about the class is an equal protection violation and is within Congress' Fourteenth Amendment § 5 power to prevent and remedy. *See* Pet. Br. 27-28.

Respondents' submission, in contrast, is that the Equal Protection Clause does not reach age discrimination in employment at all—that "it is difficult to imagine an act of age discrimination in employment that would rise to the level of a constitutional violation." Resp. Br. 26. *See also id.* at 25 ("government rarely if ever violates the Constitution by treating individuals differently on the basis of age"). That premise carries respondents to the conclusion that an age discrimination statute can pass the *City of Boerne* "proportionality" test only if the statute provides that every public-employer act of discrimination against an older worker can be justified by the generalization that physical and mental capacity sometimes diminish with age—no matter how inapt that generalization may be as applied to the particular act and the particular employee, and without regard to whether the generalization even was the actual basis for the challenged employment action. *See* Resp. Br. 40-42. At bottom, respondents' position is that a state agency *never* should be required to justify an age-based employment action "in a court of law," *id.* at 42—at least not unless the court will issue "an instruction to return a verdict in the defendant's favor," *id.* at 41. On respondents' theory, the only "proportional" age discrimination law would be one that permitted all age discrimination in public employment.

For this highly implausible concept of constitutionally protected age discrimination, respondents rely on cases in

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Inc. v. Criswell, 472 U.S. 400, 414-15 (1985) (quoting *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 235 (5th Cir. 1976)).

which this Court has discussed the limits of judcial authority in passing on the constitutionality of legislation providing for mandatory retirement of certain categories of government personnel: *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976); *Vance v. Bradley*, 440 U.S. 93 (1979); and *Gregory v. Ashcroft*, 501 U.S. 452 (1991). *See* Resp. Br. 22-26. As we have explained, the Court's decisions, while recognizing that judicial deference is particularly appropriate in reviewing such legislation, by no means provide, even in that context, the blank check for age discrimination that respondents would read into them. *See* Pet. Br. 36-37; *Gault v. Garrison*, 569 F.2d 993 (7th Cir. 1977), *cert. denied*, 440 U.S. 945 (1979).

And, respondents simply ignore our showing, and that of the United States, that given the nature of the legal question presented, *Murgia, Vance* and *Gregory* do not undertake to define, much less to exhaust, the substantive content of the Equal Protection Clause.

What this means, first, is that this Court's holdings that a *legislature* may rely on broad generalizations about age when enacting certain legislation does not lead to the conclusion that a *government employer* may rely on the same type of generalization—stereotype, if you will—when making *individual employment decisions. See* Pet. Br. 37-39; U.S. Br. 43-44. This is not to say that "the protections of the Equal Protection Clause are any less when [a] classification is drawn by legislative mandate . . . than by administrative action," *Nordlinger v. Hahn*, 505 U.S. 1, 16 n.8 (1992), cited in Resp. Br. 25. Rather, it is to say that what may be a rational classification for purposes of a governmental decision that is broad in scope and application, and that is made by a body (the legislature) that, by its institutional nature, deals in generalities, may *not* be rational for purposes of another decision that is narrower in scope and as to which individualized information is available to the decisionmaker. *See* Pet. Br. 37-39.

This is very much to the point here, because the general demise of mandatory retirement laws, *see* U.S. Br. 43-44—a development respondents acknowledge, Resp. Br. 37—means that "[t]he practice now challenged in most ADEA cases . . . is the unauthorized use of age as part of an ad hoc, individualized assessment by an employer." U.S. Br. 44. *See also id.* at 47. None of the equal protection decisions of this Court on which respondents rely sanctions arbitrary age discrimination in decisionmaking of that nature.

Murgia, Vance and *Gregory* are indeed at a double remove. Those cases not only have to do with the limited judicial role in passing on legislation, but each turns as well on the even more limited judicial role in ascertaining social facts.

When this Court decided *Murgia,* it had before it no record to establish that, as a general proposition, "the aged . . . have . . . been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities," 427 U.S. at 313, and no capacity to amass and assess such a record. It was largely for that reason that the *Murgia* Court concluded that older workers do not "constitute a suspect class for purposes of equal protection analysis." *Id.* Congress, on the other hand, determined after years of study that discrimination against older workers *is* the result of arbitrary and invidious stereotypes. *See* Pet. Br. 28-30; U.S. Br. 29-39. By acting on "the evidence [thus] presented" to it, Resp. Br. 37,[10] Congress did not "utterly disrespect" this Court's role, *id.*, nor did the Legislature seek to overturn this Court's decision in *Murgia.* Unlike *City of Boerne,* where Congress overstepped its role by attempting to overrule a decision of this Court defining the substance of a con-

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[10] Quoting House Select Comm. on Aging, 95th Cong., 1st Sess., Mandatory Retirement: *The Social and Human Cost of Forced Idleness* 38 (Comm. Print 1977).

stitutional right, *see* Pet. Br. 25-26, standards of judicial review such as the Court articulated in *Murgia* are rules for enforcing constitutional guarantees "*absent controlling congressional direction.*" *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985) (emphasis added). Congress shows no disrespect for the Court when it determines, after legislative study of a problem, that the authority available to the courts in the absence of legislation is insufficient to combat effectively a particular kind of arbitrary discrimination. In such a case, Congress has the power under § 5 to enact remedial legislation. *Murgia* and its progeny cannot be read to deny Congress that authority where age discrimination in employment is concerned.

CONCLUSION

The decision of the Court of Appeals should be reversed.

Respectfully submitted,

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